A **SHAMSUL ANUAR MOHD TAHIR & ORS**

v.

MOHSIN AHMAD

B HIGH COURT MALAYA, ALOR SETAR
SOFIAN ABD RAZAK J
[ORIGINATING SUMMONS NO: M2-24-1941-08]
3 DECEMBER 2009

C ***CIVIL PROCEDURE:*** *Judgments and orders - Setting aside - Distribution order - Application by way of originating summons - Correct procedure, whether by way of appeal - Jurisdiction of court - Small Estates (Distribution) Act 1955, s. 29*

D ***CIVIL PROCEDURE:*** *Originating summons - Whether application can be made by originating summons - Setting aside of distribution order - Correct procedure, whether by way of appeal - Jurisdiction of court - Small Estates (Distribution) Act 1955, s. 29*

E ***CIVIL PROCEDURE:*** *Jurisdiction - High Court - Setting aside of distribution order - Correct procedure, whether by way of appeal - Appellate or original jurisdiction - Small Estates (Distribution) Act 1955, s. 29*

In this application by the plaintiffs seeking, *inter alia*, to set aside a distribution order dated 13 February 2008, the only issue requiring F determination was whether the plaintiffs had adopted the wrong procedure by filing an application by way of an originating summons instead of proceeding by way of an appeal, thereby resulting in the court lacking jurisdiction to hear the application.

G **Held (dismissing the application):**

(1) It is beyond doubt that the High Court's jurisdiction to set aside a distribution order is clearly provided by s. 29 of the Small Estates (Distribution) Act 1955, and the nature of that jurisdiction is appellate and not original. In the instant case, the H plaintiffs, by choosing to initiate this proceeding by way of originating summons rather than by way of appeal, had adopted the wrong procedure. Hence, this court had no jurisdiction to hear the plaintiffs' application. *Fatimah Mat Akir & Anor v. Sharifah Haji Ahmad & Ors* (foll); *Ibrahim Saad & Ors v. Hj* I *Hamid Lebai Taib* (foll). (paras 16, 17 & 18)

Case(s) referred to:
Fatimah Mat Akir & Anor v. Sharifah Haji Ahmad & Ors [1976] 1 LNS 29 ***(foll)***
Ibrahim Saad & 5 Ors v. Hj Hamid Lebai Taib & 3 Ors [1997] 1 LNS 74 ***(foll)***

Legislation referred to:
Small Estates (Distribution) Act 1955, s. 4(1), (2), 7(1), 13, 29
Small Estates (Distribution) Regulations 1955, reg. 10

For the plaintiff - Hazlan Abd Hamid; M/s Iszam Kamal & Hazlan
For the defendant - Mohd Pahmi Shaari; M/s Fahmi Mohd & Assoc

Reported by Suresh Nathan

JUDGMENT

Sofian Abd Razak J:

[1] Enclosure 1 is the plaintiff's application by way of originating summons dated 14 December 2008 and fixed for hearing on 18 February 2009. In the said application, the plaintiff prays for the following reliefs namely:

a) That the court set aside the distribution order made pursuant to Distribution Order (Section 13) Distribution No: JKPTG/PK/02/01/0480(A)/2007 Small Estates (Distribution) Ordinance 1955 dated 13 February 2008 in the name of Mohsin bin Ahmad;

b) That the transfer with presentation No: 3741/2008 dated 3 June 2008 in respect of the undivided share of 960/5280 in the First Property held under GM 1971 Lot No: 100 Mukim Pumpong from Mohsin bin Ahmad to Ahmad bin Bakar be set aside;

c) That the plaintiffs herein be named in the above title deed in accordance with the Faraid Certificate No: 02001-040-0330-2008 dated 19 March 2008 issued by the Lower Syariah Court Alor Setar;

d) That the Land Administrator, Kota Setar is hereby ordered to give effect to this order;

e) That assessment of damages (if any) be fixed before the deputy registrar, High Court Alor Setar;

A f) Costs of this application be costs in the cause;

g) Any other relief deemed fit and just by the Honourable Court.

The Factual Background

B **[2]** The plaintiff is the lawful grandson of Hashim bin Saad (deceased) who died since 1940. The deceased's beneficiaries are Ahmad bin Hashim and Zainab binte Hashim (deceased) the mother of the plaintiff who died on 31 July 1992. The plaintiff's deceased mother has five children including the plaintiff whose C names are as follows namely:

1. Shamsul Anuar bin Mohd Tahir;
2. Abdul Rahman bin Mohd Tahir;

D 3. Ibrahim bin Mohd Tahir;

4. Fuzia binti Mohd Tahir;
5. Rohani binti Mohd Tahir.

E **[3]** In the meanwhile the uncle of the plaintiff, Ahmad bin Hashim died on 8 November 1971 and left behind the following beneficiaries namely:

1. Esah binti Ahmad (deceased) died on 24 July 1998;

F 2. Mohsin bin Ahmad;

3. Mokhtee bin Ahmad;
4. Zaleha binti Ahmad.

G **[4]** It was further averred that when the deceased (Hashim bin Saad) died he had the following properties namely:

a) 960/5280 undivided share in property held under GM1971 Lot 100 Mukim Pumpong (hereinafter called the "first property");

H b) 10560/58080 undivided share in property held under GM 1985 Lot 42 Mukim Pumpong (hereinafter called the "second property");

I c) Cash money in the sum of RM19,433.91 held in the Amanah Raya Bhd.

[5] Nevertheless, a beneficiary to Ahmad bin Hashim (deceased) namely, Mohsin bin Ahmad, the defendant herein had filed the Form A to lay claim the undivided share of the first property of 960/5280 and the second property of 10560/58080 without making known the rights and interests of the other beneficiaries. The vesting order vesting both the first and the second property respectively in the defendant was made on 13 February 2008.

[6] The plaintiff found out that the first property had already been sold to a purchaser named Ahmad bin Bakar for a purchase price of RM307,828. The plaintiff avers that the sale of the first property by the defendant did not get the consent of the plaintiff and the other beneficiaries and the proceed of the sale was solely enjoyed by the defendant without sharing it with the other beneficiaries.

[7] On 19 March 2008 the Lower Syariah Court Alor Setar issued the Faraid Certificate No: 02001-040-0330-2008 which shows that the plaintiff and the other beneficiaries were entitled to their respective shares of the properties.

[8] The plaintiff avers that, based on the aforesaid reasons and the documents exhibited clearly shows that there was evidence of fraud and forgery committed by Mohsin bin Ahmad on him and the other beneficiaries. The plaintiff had also lodged a police report on the alleged fraud and forgery.

[9] The plaintiff's application was served on the defendant by way of A.R Registered post on 21 January 2009 and received on 23 January 2009 and an affidavit of service was filed in court on the 17 February 2009. On 18 February 2009 when the matter came up for hearing the then solicitor for the defendant. Puan Thauhirah appeared and asked for a next date to file an affidavit in reply to which the court granted. On 27 April 2009 En. Iszam appeared for the plaintiff and En Mohd Fahami appeared on behalf of the defendant taking over the matter from the previous solicitor. The court fixed 23 June 2009 as the hearing date for the matter and directed both parties to prepare an outline submission together with a bundle of authority. On 23 June 2009, En Mohd Fahami informed the court the he was unable to file an affidavit in reply because the defendant had suffered a stroke. The learned counsel for the plaintiff objected to any further postponement as the matter

is long outstanding. The court nevertheless postponed the matter to 6 August 2009 for the parties to prepare their respective written submissions and authority.

[10] On 3 September 2009 the hearing on encl. 1 proceeded without the defendant filing an affidavit in reply but learned counsel for the defendant submitted that he would be submitting on points on law which does not requires an affidavit in reply to be filed. The one legal issue which learned counsel for the defendant had alluded the court to was the issue of whether the correct procedure was adopted and whether the court had the jurisdiction to hear the plaintiff's application.

[11] The brief submission by learned counsel for the defendant was that the plaintiff had adopted the wrong procedure by filing an application by way of an originating summons instead of by way of an appeal to consequently the court had no jurisdiction to entertain the plaintiff's claim. The learned counsel for the defendant referred to the cases of *Fatimah binti Mat Akir & Anor v. Sharifah binti Haji Ahmad & Ors* [1976] 1 LNS 29; and *Ibrahim Saad & 5 Ors v. Hj Hamid Lebai Taib & 3 Ors* [1997] 1 LNS 74.

The learned counsel for the plaintiff disagrees with the submission of the defendant' counsel and held otherwise.

[12] The court after hearing oral submissions by both parties dismissed the plaintiff's application (encl. 1) with no order as to costs. The plaintiff who is dissatisfied with the said decision has since filed a notice of appeal.

Finding Of The Court

[13] The court refers to the Small Estates (Distribution) Regulations 1955 in particular to reg. 10 thereof in respect of appeal where it is stated and reproduced in verbatim as follows:

> Section 10 Appeal.
>
> (1) (a) Appeals to the High Court shall be brought by giving notice of appeal in From K2.
>
> (b) An appellant may appeal from the whole or any part of a decision (which expression shall, in these Regulations, means any order, decision or act made or done by a Collector) and the notice of appeal shall state whether the whole or part only, and what part, of the decision is appealed against.

(c) The notice of appeal shall be entitled and filed in the proceedings before the Collector and shall be filed in the Collector's Office within 14 days from the day on which the decision appealed against was pronounced. Sufficient copies of the notice of appeal shall be filed to provide copies for all parties affected by the appeal and in addition copies for the Court and for the Collector. At the same time the appellant:

(i) shall pay a fee of RM50.00 being the inclusive fee for the appeal and shall deposit with the Collector a sum which in the opinion of the Collector will cover the cost of preparing a sufficient number of copies of the appeal record for the use of the High Court and the parties to the appeal; and

(ii) lodge with Collector a sum of a thousand and five hundred or such lesser sum as the Collector may in any case direct, by way of security for the costs of the appeal.

(d) The notice of appeal shall be served by the appellant on all parties directly affected by the appeal. It shall not be necessary to serve parties not so affected.

(e) When the appellant has complied with all the requirements of paragraph (1) he shall appear before the Collector who shall thereupon endorse on one copy of the notice of appeal a certificate that the necessary fee and deposits have been paid as aforesaid and that he is satisfied that service of the notice of appeal has been made on all parties affected.

(2) The Collector shall thereupon prepare the requisite number of copies of the appeal record and the record shall contain copies of:

(a) the notice of appeal, endorsed under paragraph (1)(e) above;

(b) the notes of evidence before the Collector;

(c) the decision appealed against;

(d) the grounds of decision;

(e) the documentary exhibits;

(f) any other relevant documents; and

(g) a list of the persons affected by the appeal and their addresses.

(3) As soon as the appeal record is ready the Collector shall transmit one copy thereof to the appellant and shall serve on him a notice in Form K3 which shall have annexed thereto sufficient copies of Form K1. If the amount of deposit under paragraph (1)(c)(i) for costs of preparation of the appeal records is sufficient, the Collector shall require payment of the balance of the cost from the appellant.

(4) Within 14 days of service of the notice under paragraph (3) above, the appellant shall file with the Collector in duplicate a memorandum of appeal in Form K1, and shall pay the balance (if any) required under paragraph (3). In default of such filing and payment within the time allowed, the appeal shall be deemed withdrawn.

(5) Immediately on receipt of the memorandum of appeal and the payment of the balance of deposit (if any) the Collector shall:

(i) supply the appellant with sufficient copies of the appeal record for service on the other parties affected by the appeal;

(ii) forward to the appropriate Assistant Registrar of the High Court the remaining copies of record, together with at least one copy of the memorandum of appeal. He shall also transmit to the Assistant Registrar the sum deposited under paragraph (1)(c)(ii) above; and

(iii) forward a copy of the memorandum of appeal to the State Legal Adviser concerned for his perusal and representation during the appeal proceedings in the High Court.

(6) The appellant shall serve copies of the memorandum of appeal and the appeal record on all parties directly affected by the appeal.

(7) The Assistant Registrar shall forward a copy of the appeal judgment to the Collector, who shall thereupon take all the necessary steps to put the decision therein into force.

Form K2

(Regulation 10(1)

Malaysia

State of ...

In The High Court At ...

Civil Appeal No ... Of ... 19 ...

Distribution Suit No ... of ... 19 ...

In the Estate of ... deceased Petition of ... of ...

Notice Of Appeal

Small Estates (Distribution) Act 1955

(Section 29)

TAKE NOTICE that ... being a person aggrieved by the Order/Decision/or ... made/done by the *... for the District of in the above-mentioned Distribution Suit ... on the ... day of ... 19 ... appeals to the High Court against either the whole of the said order/decision ... Or such part of the order/decision as decided that ...

Dated this ... day of ... 19 ...

Solicitor/Appellant

To the District Land Administrator/Collector/District Officer/Sarawak Administrative Officer for the District of ... and to ...

* Insert District Land Administrator/Collector/District Officer/Sarawak Administrative Officer, as the case may require.

[14] In this regard the court refers to the case of *Fatimah binti Mat Akir & Anor (supra)* where the brief facts are that after the death of one Akil bin Lebai Mat, the Settlement Officer made a distribution order under the Small Estates (Distribution) Ordinance 1955 for the distribution of the estate of the beneficiaries according to Muslim law. According to the record all the beneficiaries present agreed. Subsequently it was alleged that the first widow Aishah was of unsound mind. Her daughters who were committee applied to the High Court to set aside or vary the Settlement Officer's order and for a declaration that a half-share of the deceased's interest in the land be transferred to Aishah as syarikat property. The trial

judge dismissed the application as he held he had no jurisdiction. The Federal Court agreed with the learned High Court judge that under s. 4(1) of the Small Estates (Distribution) Ordinance the High Court has no original jurisdiction but the collector who has exclusive original jurisdiction in the distribution of small estates and the proper course for the appellants was to have appealed against the Settlement Officer's Order which they did not do so and therefore the application was rightly dismissed.

[15] Reverting to the facts of the instant case, the plaintiff's application by way of originating summons which *inter alia* seeks to set aside the Distribution Order dated 13 February 2008 and begs the question of whether it could be set aside other than by way of appeal under s. 29 of the Act which states as follows:

> (1) Subject to the other provisions of this Act and to subsection (5) any person aggrieved by any order, decision or act made or done by a Collector under this Act may appeal to the High Court:
>
> Provided that ...
>
> (2) The time limited for appeal and the procedure in every such appeal shall unless otherwise provided by the rules made under Section 30 conform to the time limited for and the procedure in, a civil appeal from a Sessions Court with such variations as may be necessary and the same fees shall be payable.

[16] In the instant case the plaintiff did not appeal against the order perhaps it was too late to appeal. The court is of the view that if the reason for not appealing is because it was out of time, the plaintiff can always applied for leave to file appeal out time. It could also be that the present proceedings is perhaps to circumvent the Act. It is beyond doubt that the High Court's jurisdiction to set aside a distribution order is clearly provided by s. 29 of the Act. The jurisdiction is appellate and not original. As to the jurisdiction of the court to make a distribution order in respect of small estates such as sought by the plaintiffs in prayer (c) that 'the plaintiff's named herein be named in the above title deed in accordance with the Faraid Certificate No: 02001-040-0330-2008 dated 19 March 2008 issued by the Lower Syariah Court Alor Setar' it is to be observed that s. 4(2) of the Act expressly states that the collector shall have exclusive jurisdiction to deal with the distribution and administration of small estates.

[17] In the case of *Ibrahim bin Saad & 5 Ors (supra)* where the brief facts are *inter alia* the plaintiffs applied for an order that the order of distribution made in favour of the defendants in a small distribution case be set aside as it is obtained by fraud on the part of the first defendant. Counsel for the defendants made a preliminary objection that this being a matter involving a small estate, the High Court had no jurisdiction to entertain the suit. Alauddin Mohd Sheriff J (as his lordship then was) dismissed the plaintiffs' claim and held the view that from reading of ss. 4(1) and 7(1) of the Small Estates Distribution Act 1955, the Land Administrator had exclusive jurisdiction to deal with the distribution and administration of small estates. The jurisdiction of the High Court which was clearly provided for by s. 29 of the Act was appellate and not original. The only proper way in which the issue of fraud could be addressed before this court by the plaintiffs was by way of an appeal against the order of Land Administrator.

Conclusion

[18] Based on the reasons as adumbrated above, the court is of the considered view that it has no jurisdiction to hear the matter in its original jurisdiction except appellate. This is clearly stated in s. 29 of the Act. In the instant case the plaintiffs have chosen to initiate this proceeding by way of originating summons rather then by way of an appeal and therefore the plaintiffs have adopted the wrong procedure. The court agrees that if the time for filing the notice of appeal has lapsed, the plaintiffs could ask for leave to file an appeal out of time which they have not done. In the circumstances of the case the plaintiffs' application (encl. 1) is hereby dismissed with no order as to costs.